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No. 06-1619

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GOOD NEWS EMPLOYEE ASSOCIATION,
REGINA REDERFORD, ROBIN CHRISTY,
Petitioners,

v.

JOYCE M. HICKS, in her individual and official capacities as Deputy Executive Director of the Community and Economic Development Agency of the City of Oakland, ROBERT C. BOBB, in his individual and official capacities as City Manager of the City of Oakland.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF THE PETITIONERS PETITION FOR A WRIT OF CERTIORARI

PETER J. FERRARA *
American Civil Rights Union
Suite#960
1600 Wilson Blvd
Arlington, VA 22209
703-582-8466

* Counsel of Record

Counsel for *Amicus Curiae*
American Civil Rights Union

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct for a time or fit a particular ideology. It was founded by former Reagan Senior White House Policy Advisor Robert B. Carleson in 1998, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This is exactly the kind of case that is of interest to the ACRU because we want to ensure that the constitutional rights of Christians and others who want to express and uphold traditional moral values are fully recognized and protected, and not minimized or overlooked because of political correctness or ideological bias.

All parties have consented to the filing of this brief.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. The letters of consent to the filing of this brief have been enclosed.

INTRODUCTION

We urge the Court to grant the requested Writ of Certiorari because this case presents increasingly urgent questions of law regarding the free speech rights of politically disfavored local minorities. The facts of this case reveal discriminatory prejudice against Christian employees by the City of Oakland reflected in viewpoint discrimination regarding their freedom of speech.

Moreover, this is not an isolated case. These issues are increasingly important because similar discriminatory prejudice is now exhibited in more and more local government jurisdictions across the country where there is no serious political competition, and the majority increasingly tramples on the rights of minorities that hold politically disfavored, incorrect views. More and more across America, those who espouse traditional moral values in banal, innocent terms, such as in this case, are being told they have engaged in unlawful discrimination and hate speech, and are being punished for it.

Under the rulings of the courts below, use of the words "natural family", "marriage", and "family values" in regard to public policy issues concerning homosexuality constitutes homophobic hate speech and grounds for dismissal of public employees. This precedent affects the speech not only of the plaintiffs in this action, but of every public employee. Indeed, if this language is now legally homophobic hate speech, that determination can serve as the basis for liability under various anti-discrimination laws for all citizens.

The end result is that freedom of speech is restricted for everyone who wants to advance or speak in favor of traditional moral values.

STATEMENT OF THE CASE

As the District Court stated, "The facts are not in material dispute." App. 7a. This case involves two African-American, Christian females employed in the Community and Economic Development Agency ("CEDA") of the City of Oakland. App. 27a. They observed that employee organizations were allowed to use the City's employee email system and bulletin boards to promote their activities, viewpoints and values. App. 27a-28a; 66a-89a. This included the Gay Straight Employee Alliance, which aggressively promoted its views regarding gay sex, homosexual marriage, and other issues. Among other activities, the Alliance sponsored "Happy Coming Out Day", which stimulated discussions in the work place regarding personal sexual practices. App. 27a, 76a-87a.

A broad range of issues and viewpoints were exhibited on the employee email system and bulletin boards. One email criticized Christians and the Bible, stating, "I understand that this is a difficult concept for some who feel the Bible teaches them that sexual identity as a gay or lesbian is wrong. The Bible also says "slaves obey your master" and "women obey your husbands". I personally think the good book needs some updating." App. 85a.

Another email communication announced "the first anti-Iraq War teach in sponsored by a city government anywhere in the U.S." App. 89a. A flyer posted on City bulletin boards announced another rally saying, "STOP War on Iraq, War on us". It called for "Books NOT Bombs, Jobs NOT Jails, Healthcare NOT Warfare, Rights NOT Racism." App. 68a. Other postings on the email system or bulletin boards discussed war and peace, racism, slavery, communism, Osama bin Laden, personal sexuality, sports, Jewish cultural events, Hispanic cultural events, and the first

annual holiday mixer of the Gay Straight Employee Alliance. App. 66a-89a.

Based on their Christian values, CEDA employees Robin Christy and Regina Rederford often did not agree with the email and bulletin board postings of other employees. But instead of complaining to restrict the freedom of others, they formed their own employee organization, the Good News Employee Association, which met regularly to pray and discuss their Christian perspectives on the major issues of the day.

Christy and Rederford were shocked when they were denied the same access to the employee email system for their announcements as other employee organizations. App. 27a, 41a. This reflected the hostility to their Christian values in the City bureaucracy. App. 27a. 28a.

So, in November, 2003, Christy and Rederford proceeded to post a bulletin board notice regarding their organization that read as follows:

"Preserve Our Workplace With Integrity.

"Good News Employee Association is a forum for people of Faith to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family Values,

"If you would like to be a part of preserving integrity in the workplace call Regina Rederford ...or Robin Christy...."

App. 65a.

The group referenced the need to preserve integrity in the workplace because of the discrimination it had already suffered in being denied access to the employee email system

while this was routinely allowed for all other employee groups, including a homosexual advocacy group with opposing views. App. 41a.

City officials responded to the posted notice first by removing and confiscating it on January 3, 2004. Then, on February 20, 2004, City officials issued Administrative Instruction 71 ("AI 71"), which announced adoption of an anti-discrimination/non-harassment policy regarding employee conduct in the workplace, effective January 1, 2004. App. 28a. A letter accompanying the policy by Defendant Joyce Hicks, Deputy Director of CEDA, stated,

> "We have recently had incidents in our agency where staff has inappropriately posted materials that are in violation of AI 71. Specifically flyers were placed in public view which contained statements of a homophobic nature and were determined to promote sexual orientation based harassment. [...] Failure to comply with the directives in AI 71 and 140 will include disciplinary action up to and including termination."

App. 8a, 10a, 28a-29a

Everyone realized that this statement referred to the posted notice by Rederford and Christy. The words "of a homophobic nature" that "were determined to promote sexual orientation based harassment" were "Natural Family, Marriage, and Family Values." Hicks' letter clearly indicates that use of these words violates AI 71 and is subject to the sanction of termination. The letter also clearly indicates that if Rederford and Christy continued to use such language they would be terminated.

There were no special circumstances that made the use of the words in this case uniquely objectionable. Indeed, the District Court below stated,

> "[P]laintiffs' speech was not accompanied by anything that would have exacerbated its effects in the workplace. For example, the speech was not explicitly threatening nor expressly directed toward a particular employee or group of employees. Instead, the flyer was merely posted on the bulletin board, along with all the rest of the notices."

App. 47a.

The District Court also said,

> "Plaintiffs' speech, while perhaps indicating disagreement with the message promoted by homosexual groups, does not seem the type of expression that would reasonably create workplace disruption. The flyer's indirect implication of plaintiffs' disapproval of homosexuality simply is not the kind of blatant or offensive speech that on its face would cause disorder or controversy. Indeed, plaintiffs' flyer is quite different from other government employee speech about homosexuals that courts have found may be restricted....[P]laintiffs in this case have made no announcements to the general public, have used no openly derogatory terms about homosexuals and have not specifically targeted particular individuals."

App. 48a-49a.

What the District Court did find damning, however, were these further expressions of traditional moral values and

standard Christian doctrine, which were not included in the flyer:

> "In its 'statement of faith', GNEA explains that 'we believe the Natural Family is defined as a man and a woman, their children by birth or adoption, or the surviving remnant thereof (including single parents)'; that '[w]e believe Marriage is defined by a union between a man and a woman according to California state law'; and that '[w]e believe in Family Values that promote abstinence, marriage, fidelity in marriage and devotion to our children.'"

App. 7a. The District Court considered this language critical evidence of the "anti-homosexual import" of the use of the words Natural Family, Marriage, and Family Values.

In other words, when Christians or others who believe in traditional moral values use these words, the communication involves anti-homosexual discrimination and hate speech. This case consequently becomes a shocking precedent for limiting the free speech rights of Christians and other advocates of traditional moral values, and for punishing them for expression and advocacy of those Christian beliefs and traditional values, under anti-discrimination laws. The precedent would not even be limited to public employees, as the ruling would bear on use of these words by others who hold to Christian and traditional moral values and whether their expression indicated violations of anti-discrimination prohibitions.

In response to these actions by City officials, Plaintiffs Christy and Redeford filed this suit against the City of Oakland, Robert C. Bobb, City Manager of the City of Oakland, and Joyce. M. Hicks, Deputy Executive Director of CEDA. The District Court dismissed several causes of action in the original suit for failure to state a claim. It

dismissed the City of Oakland from the case because of failure of the Plaintiffs to serve the City and failure to prosecute. In a later opinion, the District Court granted summary judgment dismissing Plaintiffs' claim against Hicks and Bobb for violation of Plaintiffs' First Amendment free speech rights. The Ninth Circuit affirmed these rulings

SUMMARY OF ARGUMENT

Once Oakland City officials allowed employees to use the City email system and bulletin boards for personal political and social postings, they could not engage in viewpoint discrimination. Yet, the City's treatment of GNEA and the employees behind it clearly involved the most blatant viewpoint discrimination.

While the City has a compelling state interest in stopping discriminatory communications and hate speech, the traditional Christian doctrines and moral values included in GNEA's communications cannot remotely be characterized as involving such discrimination and hate speech. Quite to the contrary, advocacy of these Christian, traditional moral values is constitutionally protected by both the Freedom of Religion and Free Speech Clauses. Once City officials allow other employees to advance their social, moral and political values in the workplace, the officials are constitutionally required to permit advocacy of Christian, traditional moral values on equal terms as well.

There is no legal authority or justification for viewpoint discrimination even in the public employee workplace. Moreover, in any event, a broad range of controversial political, religious, and social topics were raised by employees on the City's email system and bulletin boards. If the City did not find that these communications disrupted the workplace, then it cannot claim that the

innocent expression of widely held traditional moral values by GNEA disrupted the workplace. Indeed, as a factual matter, there was no significant disruption in the workplace as a result of GNEA's communications. Consequently, the City's legitimate administrative interest in avoiding workplace disruption could not outweigh the constitutionally protected employee interest in free speech.

The importance of this case goes far beyond the free speech rights of the public employees in this case, or even of public employees in general. Increasingly across America, private organizations and individuals that advance and uphold traditional moral values and Christian doctrine are being told by government officials that such conduct violates anti-discrimination laws. This is then used as a basis for denying these organizations and individuals use of public facilities or participation in government programs or receipt of general government benefits on the same terms as everyone else. The same issue arises in government contracting.

If the rulings of the courts below are allowed to stand, then they will be important precedents supporting this increasingly widespread violation of the free speech rights and freedom of religious belief of Christians and others who espouse and uphold traditional moral values and Christian doctrine.

In failing to find viewpoint discrimination unconstitutional, the decisions of the courts below are in conflict with the decisions of this Court and of every Circuit Court on viewpoint discrimination.

ARGUMENT

I. This Case Presents Important, Increasingly Urgent Questions of Law Regarding the Free Speech Rights of Those Who Believe in Traditional Moral Values and Christian Doctrine.

Oakland City officials did not have to allow employees to use the City email system and bulletin boards for personal political and social postings. But once they did, they could not engage in viewpoint discrimination. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School, 533 U.S. 98 (2001); Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). Yet, that is exactly what they did in this case.

Only the politically disfavored Christian employee group, GNEA, was denied use of the email system to announce its existence and activities. When the group posted a notice on the bulletin board announcing the same, City officials took down the notice and confiscated it, which they did not ever do in regard to any other notice posted by any other employee or group. The City officials then threatened to terminate the employees behind GNEA if they continued to try to advance their Christian and traditional moral values message in the workplace. Yet others were allowed to continue to advance the messages and values in which they believed, including groups whose messages and values were directly contrary to those held by the employees behind GNEA.

The City officials consequently violated the free speech rights of Petitioners in at least these three ways. Not just in taking down the posted notice, as recognized by the courts below. But, in addition, in denying them equal use of

the city email system, and then in threatening to terminate them unless they stopped trying to advance their message. These are not "vanishingly small" violations, as the District Court suggested. Indeed, threatening to fire an employee unless he stops advancing his message, using innocent words such as family values and marriage, shuts down the employee's free speech rights on a permanent basis.

Moreover, there is no doubt that City officials engaged in these actions because of the content of GNEA's message, of which they disapproved. This conduct is constitutionally impermissible.

The District Court suggested that the Plaintiffs were not completely precluded from advancing their message in the workplace. But the letter from Hicks discussed above, and the District Court opinion itself, App. 7a, clearly indicated that GNEA's message was seen as homophobic and in violation of AI 71. Moreover, Hicks' letter baldly stated that continued violations of AI 71 would be sanctioned by termination.

Yes, the City has a compelling state interest in stopping discriminatory communications and hate speech. But the traditional Christian doctrines and moral values included in GNEA's communications cannot remotely be characterized as involving such discrimination and hate speech. These are values held by millions and millions of Americans, if not a majority, going back thousands of years, widely held to be socially beneficial. It is not for the City of Oakland, or, frankly, even the Federal courts, to tell citizens that these Christian, Biblically based, traditional moral values are now socially and legally unacceptable, with their advocacy subject to serious government sanctions. Quite to the contrary, advocacy of these Christian, traditional moral values is constitutionally protected by both the Freedom of Religion and Free Speech Clauses. Once City officials allow

other employees to advance their social, moral and political values in the workplace, the officials are constitutionally required to permit advocacy of Christian, traditional moral values on equal terms as well.

The courts below, however, ruled in just the opposite way. It was precisely the belief of the GNEA employees in traditional moral values and Christian doctrines that made use of the words Natural Family, Marriage, and Family Values legally objectionable and sanctionable. This reasoning of the opinions below increases the assault on the free speech of Christians and other advocates of traditional moral values, and makes the decisions even more constitutionally objectionable.

The courts below analyzed this case as involving the limited right to free speech in the workplace of public employees. The District Court ultimately concluded that the City employer's legitimate administrative interests in avoiding workplace disruption outweighed the employee interest in free speech.

But the District Court failed to consider the broad context in which the GNEA communications occurred. As discussed above, a broad range of controversial political, religious, and social topics were raised on the City's email system and bulletin boards. If the City did not find that these communications disrupted the workplace, then it cannot claim that the innocent expression of widely held traditional moral values by GNEA disrupted the workplace. Indeed, there was no significant disruption, as the District Court found. App. 47a, 48a-49a.

Moreover, given the broad range of these other communications, the restrictions and sanctions against the GNEA communications surely did not involve time, place and manner restrictions. App. 18a. In allowing the other

communications, the employer had already determined that the time, place and manner was appropriate.

More fundamentally, however, there is no legal authority or foundation for viewpoint discrimination in the public employee workplace, at least in regard to non-work related speech. Whether this is a public employee free speech case or not, the City employer's viewpoint discrimination detailed above is constitutionally impermissible. Notably, the leading public employee free speech cases, *Pickering v. Bd of Educ of Township High School Dist 205, Will County,* 391 U.S. 563 (1968), and *Connick v. Myers,* 461 U,S. 138 (1983), did not involve viewpoint discrimination.

The importance of this case goes far beyond the free speech rights of the public employees in this case, or even of public employees in general. All across America today, when private organizations seek to use public facilities in any way, they are increasingly being asked to certify that they comply with all antidiscrimination laws. If they advocate traditional moral values or traditional Christian doctrines, this advocacy is now more and more often challenged as violating discrimination prohibitions, and disqualifying the organization for use of the facilities.

The same issue arises when private organizations seek to participate in government programs on equal terms with everyone else. If the organizations advocate traditional moral values or traditional Christian doctrines, they are increasingly challenged as discriminatory and consequently not eligible to participate or receive the same general benefits as others. The same issue arises again increasingly in government contracting.

The rulings of the courts below essentially endorse the position that advocacy of traditional moral values and

standard Christian doctrines does involve discrimination or even hate speech disqualifying the speaker from use of public facilities, government contracting, and participation in general government programs and receipt of general government benefits on the same terms as others. This is a severe, constitutionally impermissible burden on the free speech, and Freedom of Religion as well, of those who believe in traditional moral values and standard Christian doctrines.

II. The Decisions of the Courts Below Directly Conflict with All Decisions of this Court and of the Circuit Courts Regarding Viewpoint Discrimination.

In failing to find viewpoint discrimination unconstitutional, the decisions of the courts below are in conflict with the decisions of this Court and of every Circuit Court on viewpoint discrimination. *E.g. Rosenberger, supra* (public university engaged in unconstitutional viewpoint discrimination in denying funding to an otherwise eligible student publication because of the publication's religious views); *Good News Club, supra* (public school's refusal to allow student religious club to use school facilities because of club's religious viewpoint was unconstitutional); *Lamb's Chapel, supra* (public school district's refusal to rent school facilities to church to show film on family values because of church's religious viewpoint unconstitutionally violated church's First Amendment rights); *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 778 (1985)(organization cannot be excluded from government employee charitable campaign because of political viewpoint); *Cuffley v. Mickes*, 208 F. 3d 702 (8th Cir. 2000)(excluding Ku Klux Klan from state program would be unconstitutional viewpoint discrimination); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001)

(school board had engaged in viewpoint discrimination when it sought to exclude the Boy Scouts from using school facilities after hours on grounds that Scouts were in violation of school board's nondiscrimination policy).

These cases are so closely on point with the present case now before this Court. In *Good News Club,* the public school tried to deny a student religious club access to school facilities on the same terms as other student clubs, precisely because of the club's religious viewpoint. This Court found that the school's conduct involved unconstitutional viewpoint discrimination. Similarly, the City of Oakland in this case seeks to deny GNEA access to the city's facilities on the same terms as other employee clubs, because of GNEA's religious viewpoint. Consequently, this must be found to be unconstitutional viewpoint discrimination as well.

In *Lamb's Chapel*, a public school district sought to deny a church use of school facilities to show a film on family values because of the church's religious viewpoint. But the school district routinely rented school space to other groups for their activities. Therefore, it would be unconstitutional viewpoint discrimination not to do the same for the church. Similarly, in the present case, the City of Oakland seeks to deny GNEA use of the city's email and bulletin board facilities because of GNEA's promotion of family values, which the city has labeled homophobic discrimination. But the City routinely allows other employee organizations to use its facilities to communicate their values and messages. So, again, it would be unconstitutional viewpoint discrimination for the City not to do the same for GNEA.

In *Boy Scouts of America v. Till,* the school board sought to exclude the Boy Scouts from use of school facilities because it believed the traditional moral values advocated by the Scouts were discriminatory. Indeed, the

Scouts had moved from mere advocacy to action in excluding atheists and openly gay individuals from membership or adult leadership. But the court held that the Scouts were merely advocating and upholding the traditional values in which they believed. Restricting them because of these traditional values would again be unconstitutional viewpoint discrimination. In the present case, GNEA merely advocates the same traditional values as the Scouts, and doesn't exclude anybody from anything. Excluding GNEA from City facilities because of its advocacy of these values would again be unconstitutional viewpoint discrimination.

CONCLUSION

For all of the reasons discussed above, we respectfully urge this Court to grant the requested Writ of Certiorari in this case, and reverse the rulings of the courts below.

Peter J. Ferrara
Counsel of Record
American Civil Rights Union
Suite #960
1600 Wilson Blvd
Arlington, VA 22209
703-582-8466